

PENG (Migration) [2018] AATA 1555 (13 April 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Bo Peng
CASE NUMBER:	1622124
DIBP REFERENCE(S):	BCC2015/2949058
MEMBER:	Maira Brophy
DATE:	13 April 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 13 April 2018 at 3:19pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether a genuine spousal relationship exists – Lack of joint finances – Lack of joint household responsibilities – Representation of relationship to others – Limited contact since marriage – Lack of commitment – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359AA

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 5 December 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 9 October 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied on the evidence the applicant was the spouse as defined in section 5F and 5CB of the sponsor.
4. The applicant, Ms Bo Peng appeared before the Tribunal on 15 January 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Johny Chou.
5. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Background

7. The applicant, Ms Bo Peng is a 27 year old female from China. She has declared no previous relationships. Her parents reside in China.
8. Ms Peng came to Australia on 16 February 2009 on a student (subclass 573) visa which was valid until 28 April 2013. On 18 April 2013 she was granted a further student (subclass 573) visa and on 15 May 2014 she was granted a temporary skilled (subclass 485) visa. On 19 October 2015 she lodged an application for Partner (Temporary) (Class UK) (Subclass 820) visa.
9. The sponsor, Mr Johny Chou is a 30 year old male who was born in Taiwan. Mr Chou has declared no previous relationships. He came to Australia on 1 July 2003 and he is an Australian permanent resident. His parents and one brother reside in China.
10. On their application the parties stated they met on 13 January 2013 at the Thai Pothong restaurant in Newtown. They commenced a relationship on 14 February 2014. They married on 25 September 2015. They lodged an application on 9 October 2015 for a Partner (Temporary) (Class UK) (Subclass 820) visa.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the visa applicant and the sponsor were in a genuine and continuing relationship at the time of application and continue to be in a genuine and continuing relationship at the time of this decision.

12. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the visa applicant and sponsor at the hearing.
13. There were a number of inconsistencies in the evidence given at the time of hearing and these inconsistencies were put to the parties following the hearing in accordance with section 359AA of the Act. The Tribunal explained the relevance and the consequences of relying on that information. The applicant was offered an adjournment to consider the matters raised and that offer was accepted. The discrepancies were as follows:
 - The visa applicant told the Tribunal she was employed at Westfield, Chatswood and she worked from 9.30 am to 4.30 pm on Tuesday, Wednesday, Thursday and Friday and on Sundays she worked from 10 am to 5 pm. This was not consistent with the evidence given by the sponsor that the applicant was employed from Tuesdays to Sundays.
 - The visa applicant told the Tribunal she had met the brother of the sponsor when he had been in Australia for his wedding in 2014. This was not consistent with the evidence given by the sponsor that his brother had not met his wife.
 - The parties gave inconsistent evidence as to when the sponsor proposed marriage and where they were at the time.
 - The parties gave inconsistent evidence as to whether or not they had gone on a honeymoon after they married and where they went. The applicant said they had gone to Newcastle after their marriage for a short honeymoon. The sponsor had taken her to meet his best friend from high school. They had stayed in a hotel for one night. This was not consistent with the evidence of the sponsor that they had gone on a honeymoon when he was in Australia in 2016 and they had gone to the Gold Coast.
14. A further submission was received on 25 January 2018. Those submissions have been taken into account and will be referred to below.

Whether the parties are in a spouse or de facto relationship

15. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 25 September 2015 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

18. Financial

19. The applicant told the Tribunal she was currently renting a studio apartment by herself and she had been living there for the past two years. While both names were on the residential tenancy agreement the sponsor had only been there on one occasion for around two weeks. The applicant pays the rent of \$1650 per month by BPay. The applicant is employed as a customer service assistant at Westfield Chatswood. She has been employed in a permanent part time position since 2014. She is paid \$1400 net per fortnight; she occasionally does overtime which increases her earnings.
20. The sponsor is presently living and working in China in his father's business, which is the manufacture and sale of medical equipment. He is employed full time and he lives on the premises. He is not paid a wage as he has a debt to his father. His living expenses are all met by his father.
21. The applicant told the Tribunal she currently operates five bank accounts. There is a joint account both parties can access and the sponsor uses that account when in Australia. The applicant said on occasion the sponsor had transferred money to her because she helped him to pay a debt he had to Citibank of \$10,000. She said she had wanted to help him out because he had been trying to set up his own business.
22. The applicant told the Tribunal her pay is deposited into her access account and she transfers around \$2000 per month into the joint account. She said occasionally the sponsor will have a friend transfer \$100 or \$200 into the joint account but she was unsure who the friend was. She has a goal saver account in which she deposits the income she earns from social media. She currently has around \$36,000 in that account and the sponsor is not able to access that account. She has a credit card in her name and a netbank saver account. The sponsor was not able to recall any details of the applicant's pay or her savings.
23. The parties did not have any joint assets or liabilities.
24. The Tribunal finds the financial aspects of the parties' relationship are not consistent with them being in a genuine and continuing relationship either at the time of application or at the time of decision.

25. Nature of the household.

26. The Tribunal accepts the evidence of the applicant that while they have only been part of the one household for two months since they married in September 2015 they have been in contact on a regular basis. The applicant is residing in Sydney and the sponsor is presently residing in China.
27. The applicant told the Tribunal she did the majority of the housework and the washing. She stated the parties did not eat at home so neither party cooked but she did recall the sponsor

had on occasion prepared instant noodles for her. She stated the sponsor did the grocery shopping or they shopped together. The sponsor told the Tribunal they shared the housework with his contribution being largely decorative as he liked to decorative the apartment with lights. He said the visa applicant did the cooking, he did the washing and they both grocery shopped.

28. The parties do not have any joint responsibility for the care and support of children.
29. The evidence is not indicative of the parties having been part of a joint household neither at the time of application nor at the time of decision.

30. *Social aspects of the relationship*

31. Prior to hearing the parties provided five statutory declarations from friends who attested that they considered the relationship to be genuine and continuing. Generally these statements were based on general rather than specific observations and did not give considered reasons as to why they considered the relationship to be genuine and continuing especially given the particular circumstances of this matter. It was clear the authors of the statements were persons the applicant has known through her work and that they thought highly of her and valued her work contribution. That however was not the issue the Tribunal had to determine. At the time of hearing Ms Isabelle Sheldon told the Tribunal she considered the parties to be in a genuine and continuing relationship based on the way the applicant spoke of the sponsor.
32. The applicant told the Tribunal that during the time the parties were living together they would socialise with friends on a regular basis. Given her social blogging activities the parties would eat out at various places.
33. The Tribunal considered the written evidence and the oral evidence of the parties their witness and finds that in the two months they were together since their marriage the parties had undertaken limited joint social activities and represented themselves to other people as being in a genuine and continuing relationship.

34. *Nature of the persons commitment to each other.*

35. The Tribunal finds that the parties know each other personally and the Tribunal is satisfied there is ongoing communication between the parties. However, the Tribunal is not satisfied that the parties are currently in a genuine committed relationship. The Tribunal is not satisfied on the evidence that the sponsor is committed to a shared life as partners to the exclusion of all others especially given the evidence that he is currently living in China and while he spoke of his extensive travel the parties have only seen each other on few occasions since their marriage.
36. The Tribunal was not persuaded this was the conduct of parties in a committed relationship. On the evidence this was not a relationship with a long standing history of shared experiences and commitment. The Tribunal was mindful this was a relatively short relationship given the amount of time the parties have spent together. In that context there was no evidence to support a finding the parties had established a strong relationship with the potential to support them through the long periods of separation. In the context of the parties being separated and on their evidence likely to remain so for the foreseeable future the Tribunal does not find there to be evidence of the parties providing companionship to each other.
37. When the conduct of the parties was considered along with the cumulative effect of the inconsistencies in the evidence of the parties the Tribunal did not consider this to be a

relationship characterised by a mutual commitment to a shared life together. The Tribunal places considerable weight on the inconsistencies and the conduct of the parties as it considers this to be indicative that either the parties do not communicate as claimed or they do not know each other as well as parties in a committed relationship would.

38. There is insufficient evidence before the Tribunal to indicate that the applicant and her sponsor have lived together in a genuine and continuing relationship or that they provide one another with companionship and emotional support. After taking all the evidence into account the Tribunal was not satisfied that at the time of decision both parties see the relationship as long-term.
39. The Tribunal is not satisfied that the parties were, at the time of application, or are currently in a genuine spousal relationship. The Tribunal is not satisfied on the evidence that the applicant and her sponsor are committed to a shared life as husband and wife to the exclusion of all others.

40. **CONCLUSION**

41. Given the above findings, the Tribunal is not satisfied that at the time the visa application was lodged and at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. There is no evidence to establish the parties do live together at the present time and that they do not live separately and apart on a permanent basis.
42. Upon considering the evidence before the Tribunal and on the basis of the findings previously made the Tribunal is not satisfied the applicant has established she is currently living in a genuine and committed spousal relationship with the sponsor.
43. Given these findings the Tribunal, on balance, is not satisfied that at the time of this decision the parties are in a genuine relationship.
44. Therefore, the applicant does not meet cl.820.211(2)(a) and therefore does not meet the requirements of cl.820.211. Consequently, she cannot meet cl.820.221.
45. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.
- 46.
- 47.

Moir Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).